NO. 80-731

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

THE UPJOHN COMPANY,
Petitioner

versus

DEBORAH D. TIMM and ROBERT H. TIMM, JR., Husband and Wife
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Honorable Court will allow any United States District Court to frustrate the intention of Congress or to upset the predictibility of the Federal Rules of Evidence by investing any United States District Court with judicial discretion to refuse to admit trustworthy, relevant records of regularly conducted activity when Congress has determined that the United States District Courts should not have this discretion.

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This court must not allow any court to frustrated the intention of Congress or to upset the predictibility of the Federal Rules of Evidence by investing a District Court with judicial discretion to refuse to admit trustworthy, relevant records of regularly conducted activity when Congress has determined that the District Courts should not have this discretion.

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DEBORAH D. TIMM and ROBERT H. TIMM, JR., Husband and Wife,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, The Upjohn Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which was rendered on August 18, 1980, and is reported at 624 F.2d 536. A Petition for Rehearing was denied on October 6, 1980.

OPINIONS BELOW

A number of lower court decisions affect this petition. First is the unreported denial by the United States District Judge of The Upjohn Company's Motion for a Judgment Notwithstanding the Verdict or, in the alternative, for a New Trial. Second is the affirmance

of the lower court action by the United States Court of Appeals for the Fifth Circuit in an opinion dated August 18, 1980, which is reported at 624 F.2d 536. The denial of The Upjohn Company's Petition for Rehearing was without opinion. These documents are attached as appendices to this Petition. The elements of these decisions necessary for the determination of this Petition are outlined in the Statement of the Case.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on August 18, 1980, and The Upjohn Company filed a timely Petition for Rehearing. The Petition for Rehearing was denied on October 6, 1980. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. 1254(1).

FEDERAL STATUTE INVOLVED

Federal Rules of Evidence Rule 803(6).

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circum-

stances of preparation indicate lack of trustworthiness. The term "business" as used in this papagraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

STATEMENT OF THE CASE

In March of 1974, Mrs. Deborah Timm received a prescription for the drug Cleocin from Dr. Harold Tabb. She had sought treatment from Dr. Tabb because of a problem which was diagnosed as an infection of the middle ear. Some time after Mrs. Timm took the drug, she began to experience nausea and diarreha. The condition improved for a time, but it became much worse in the Summer of 1974. Mrs. Timm, on the advice of another physician, consulted Dr. Richard Leach about her condition. He treated her for

some time, but the illness became worse. Ultimately it was necessary to remove most of her large intestine.

When the colon was removed, Dr. Leach, not being satisfied with the report of the pathologist at the local hospital, sent some blocks of a representative portion of the now removed colon to Dr. Basil C. Morson, a pathologist practicing in England. Dr. Leach chose Dr. Morson because Dr. Morson was, and still is, considered the premier pathologist in the field of lower intestinal pathology. In response to Dr. Leach's request, Dr. Morson reviewed the tissues supplied by Dr. Leach and rendered a diagnosis concerning Mrs. Timm to Dr. Leach in the form of a letter report. In his report, attached as an appendix to this petition, Dr. Morson wrote, "Quite why the particular patient

we are concerned with in this letter had symptoms which followed so soon after the administration of clindamycin could be no more than an association of circumstances." In rendering his opinion about the cause of Mrs. Timm's illness, Dr. Leach did not consider this important statement from an individual he had chosen to assist him in making a final diagnosis.

Almost nine months after Dr. Morson rendered his report, Mr. and Mrs. Timm sued The Upjohn Company for damages allegedly caused when Mrs. Timm took Cleocin. Jurisdiction in the United States District Court was based on diversity of citizenship. One of the essential allegations in the complaint was that the Cleocin taken by Mrs. Timm on the prescription of her physician caused her to contract a colitis so severe that

removal of her lower intestine was required. The Upjohn Company defended these allegations vigorously. Not only did Upjohn deny any negligence in the manufacture and marketing of its product, it further denied that Cleocin caused or was in any way related to the problems suffered by Mrs. Timm.

A trial in this matter was held in September of 1977. At the trial the only witness who testified that Mrs. Timm's problem was related to Cleocin was Dr. Leach. In order to impeach his testimony and to show that Cleocin was not related to Mrs. Timm's problems, counsel for The Upjohn Company repeatedly offered Dr. Morson's report into evidence as a record of Dr. Morson's regularly conducted activity. The District Judge refused to admit the report. Ultimately, The Upjohn Company proffered the

report, but because the report had not been received in evidence, The Upjohn Company could not use it in its argument to the jury.

After the jury rendered a decision in favor of Mr. and Mrs. Timm, The Upjohn Company filed a Motion for a Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial. In support of the motion, Upjohn urged the refusal to admit the report as a reason a new trial should be granted. The District Judge denied this motion.

The Upjohn Company appealed the decision to the United States Court of Appeals for the Fifth Circuit. As part of that appeal, Upjohn argued that the lower court erred when the judge refused to receive the Morson Report in evidence. The Fifth Circuit affirmed the

lower court's decision in all respects. With regard to the decision concerning the Report, Judge Johnson wrote, "In the evidentiary rulings complained of, the lower court acted well within its discretion." 624 F.2d at 539.

One of the main arguments used to attempt to overturn the lower court's refusal to admit the Morson Report was the legal theory that the District Judge did not have any discretion to keep out reports of regularly conducted activity when there is no question of the trustworthiness of the report. This position was again argued to the appellate court in a Petition for Rehearing, but the Petition was denied on October 6, 1980.

REASON FOR GRANTING THE WRIT

THIS COURT MUST NOT ALLOW ANY COURT TO FRUSTRATE THE INTENTION OF CONGRESS OR TO UPSET THE PREDICTABILITY OF THE FEDERAL RULES OF EVIDENCE BY INVESTING A DISTRICT COURT WITH JUDICIAL DISCRETION TO REFUSE TO ADMIT TRUSTWORTHY, RELEVANT RECORDS OF REGULARLY CONDUCTED ACTIVITY WHEN CONGRESS HAS DETERMINED THAT THE DISTRICT COURTS SHOULD NOT HAVE THIS DISCRETION.

Deciding any question about the applicability of Rule 803(6) requires a two step analysis. The analysis must be in this fashion because the Rule has two major components. The first component can be described as the technical requirements necessary to qualify the offered document as something which memorializes regularly conducted activ-

ity. This first component has three subparts. The second component is the requirement of trustworthiness. In this area the Court is required to make a subjective determination that the circumstances surrounding the preparation of the document are such that the statements contained in it are truthful.

The initial analysis is to decide whether the formal requirements of the Rule are met. Here the requisites are:

1. A report of a diagnosis made at or near the time of diagnosis by a person with knowledge of the diagnosis;

2. A report made in the course of business if it was in the regular practice of the business to make the report;

3. The background about the report must be supplied by the report's

custodian or another witness with knowledge about the report.

A review of the facts of this case will clearly demonstrate that the technical requirements were fulfilled at trial.

The report was offered during the testimony of Dr. Leach. In answer to a number of questions about the report Dr. Leach demonstrated that the report as a record of regularly conducted activity. The first element was satisfied because Dr. Leach testified that Dr. Morson himself looked at the slides of the colon and made a diagnosis. That diagnosis was memorialized in the report to Dr. Leach. The second element was shown by Dr. Leach's testimony that pathologists generally make written reports about their impressions after having reviewed the slides at anyone's request. Further, it was shown that Dr. Morson

regularly rendered these reports because Dr. Leach would not have sent the slides to England if Dr. Morson did not normally report back to physicians such as Dr. Leach. The final element is fulfilled because the testimony about the report was made by the person who, at the time of trial, had actual custody of the report, Dr. Leach.

Once it has been shown that the report fulfills the technical requirements, the court can make a determination about trustworthiness. That determination is easy in this case because the testimony of Dr. Leach shows that he asked for a diagnosis at a time when there was no litigation pending. Dr. Leach, not the plaintiffs or The Upjohn Company, sought to use the information in the practice of his profession. Further, the record shows no

connection between any of the parties and Dr. Morson.

The result of the two fold analysis is plain: The Morson Report is a record of regularly conducted activity which fulfills the technical requirements of Rule 803(6). Further, the Report is completely trustworthy. The real error is that its exclusion from evidence was upheld because the appellate court determined for the first time that the judge had discretion in an area where judicial discretion does not play any role.

Absent some statutory or Constitutional basis for exclusion, a District Court must admit all evidence which satisfies the requirements for admissibility under the Federal Rules of Evidence. F. R. Evid. Rule 402. This basic provision is based on the "pre-

supposition involved in every conception of a rational system of evidence." Thayer, Preliminary Treatise on Evidence 264 (1898). Thus, in only a few closely defined exceptions will the District Judge be allowed to refuse to admit relevant evidence.

In the area of records of regularly conducted activity, the court is given some of this discretion. This discretion is based on the historical foundations of the rule, and this early basis is applicable to this Rule even though the present Federal Rules of Evidence were recently recodified. In the area of the records of regularly conducted activity, the previous law was based a former statute. Many cases were decided under that statute, so Congress, which debated the new codification at great length must be presumed to have to

approved the interpretations under the old statute. United States v. Smith, 521 F.2d 957, 968 (D.C. Cir. 1975). For this reason, the entire line of cases applicable to the old statute should be used to determine the District Court's role under the present Federal Rules.

One major case which demonstrated the limitation of a District Court's discretionary function as it relates to business records is LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2nd Cir. 1965). The document sought to be admitted was the transcript of a recording of radio communications between the ground and the crew of an airliner involved in a fatal crash. After the court determined that the technical requirements of the statute were filled, one party attempted to block its admissibility arguing that a

court would be able to refuse admission for discretionary reasons. The court disagreed. It held:

> We need not resolve that issue here, however, for this is not a case in which admissibility was a matter within the district court's discretion. We conclude that in this case sec. 1732 required admission of exhibit 15.
>
> The district court's discretion with respect to sec. 1732 is a discretion in judging whether the document offered "has an inherent probability of trustworthiness." Central RR v. Jules S. Sottnek Co., 258 F.2d 85, 88 (2 Cir. 1958). It is therefore a necessary premise for its exercise that the document's trustworthiness be in doubt. ... As we have attempted to demonstrate, however, nothing in the nature or content of exhibit 15 gives any reason to doubt its trustworthiness and Sabena in all its argument has suggested no extrinsic circumstances which would raise such doubt. To exclude such a document as exhibit 15 on the mere speculative possibility of error of fraud would frustrate the evident purpose of the

statute.

344 F.2d at 274 (Citations Omitted). The clear holding of the case is quite evident. Once it is determined that a trustworthy document fulfills the technical requirements of the Rules of Evidence, the court has no discretion. It must receive the document in evidence. To take any other course would frustrate the statute, deprive a litigant of substantial rights, and be error requiring reversal and a new trial.

Prior to the decision which forms the basis for this Petition, no appellate decision regarding admissibility of evidence under the business records exception has allowed the district court discretion outside the the consideration of lack of trustworthiness. Many of the cases state that the court does have broad discretion, but the only subject

for discretion is the question of trustworthiness. There is not one case where the court has been given the authority to exclude relevant, trustworthy evidence on the basis of judicial discretion. The lesson from the cases is crystal clear: the court may not exercise discretion to exclude a trustworthy business record. To exercise any discretion to refuse admission of such a document would go far beyond the scope of the Federal Rules of Evidence and the intent of Congress.

The panel which heard this case did not adhere to this universal interpretation of the court's role in admitting trustworthy business records. Rather, the court fashioned a new rule and gave the district court a new role. This new role was never intended by Congress or this Court, and its exercise

goes far beyond the scope of the Federal Rules of Evidence. As it stands now, any district court can, on the basis of the appellate decision in this case, refuse to admit evidence which, until this decision, was required to be admitted. Such a situation can not be allowed to stand. This Honorable Court must restore predictibility to the Federal Rules of Evidence. Only by granting a writ of certiorari can this Court ensure that litigants will not summarily and wantonly be denied the right to use heretofore admissible evidence in their arguments regarding the facts and merits of the case.

CONCLUSION

One of the most hotly contested issues in the trial of this case was the cause of the plaintiff's illness. One report, that one rendered by Dr. Basil

C. Morson, a world famous expert on the particular subject involved in this litigation, shed much light on the cause of the illness as well as on the opinions of Dr. Leach. During the cross-examination of Dr. Leach, counsel for The Upjohn Company proved all the facts necessary to admit Dr. Morson's report under Rule 803(6) of the Federal Rules of Evidence. All the technical requirements were fulfilled, and there was no question that the report carried with it a high degree of trustworthiness. Nevertheless, the District Judge refused to receive the report in evidence, and the appellate court affirmed this refusal on the sole ground that the District Judge acted within his discretion. These decisions deprived The Upjohn Company of valuable arguments that would otherwise have been made to the jury.

The major error in this case, and the reason why this Court should not allow the case to stand, is the fact that the District Judge went beyond the scope of the Federal Rules of Evidence when he excluded the Morson Report. The Upjohn Company had clearly shown that the Report was relevant, trustworthy evidence which fulfilled the technical requirements of Rule 803(6). Until this decision, it has always been the law that once these facts were shown the District Judge had no discretion. Under the law as intended by Congress, the document must be received. In this case a new, erroneous, and improper standard is set. Under the holding here, any District Judge can refuse to admit any relevant and trustworthy documentary evidence for any reason and claim he is exercising discretion. This Court

should not condone this situation, for to do so will frustrate the intent of Congress and defeat the basic requirement that evidentiary matters be clear to all litigants. Unless this Court grants relief in this case, one intermediate appellate decision can change years of achievement. For this one major reason, a writ of certiorari should be issued by this Honorable Court to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Most respectfully submitted,

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By: _____

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CERTIFICATE

The undersigned herewith certifies that three (3) copies of the foregoing petition for a writ of certiorari have been mailed this day, postage prepaid, to R. Ray Orrill, Jr., Suite 207, 7240 Crowder Road, New Orleans, Louisiana 70127, attorney for Deborah D. and Robert H. Timm, thus serving all parties required.

New Orleans, Louisiana this 5th day of November, 1980

_____

ROBERT D. BJORK, JR.

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APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DEBORAH D. TIMM, ET AL.	*	CIVIL ACTION
VERSUS	*	NO. 75-2134
THE UPJOHN COMPANY	*	SECTION "C"

* * * * * * * * * * * * * * *

R. Ray Orrill, Jr.

Attorney for Plaintiff

Henry B. Alsobrook, Jr.

Attorney for Defendant

RUBIN, Circuit Judge:*

The defendant in this diversity case asserts three grounds for judgment notwithstanding the verdict, or for a new trial. Although the court is bound in this action to follow the Louisiana substantive course, federal procedural priciples govern the three issues raised

by the defendant. Because the grounds are without merit, the defendant's motion is DENIED.

I. Was the evidence sufficient to create a Jury Issue?

The defendant, Upjohn, contends that no jury question existed as to the adequacy of its warning on the drug Cleocin because the prescribing physician, Dr. Harold Tabb, testified that the warning was adequate and that he knew at the time he prescribed Cleocin, from information supplied by Upjohn, that Cleocin could cause acute colitis. Dr. Tabb's testimony may be taken as recounting his own mental state at the moment he wrote the prescription, or as his expert opinion as a physician concerning the adequacy of the warning. We consider each possibility. 1/

Let us assume that Dr. Tabb's testi-

mony is viewed as reflecting his own state of mind at the time he saw Mrs. Timm. Even if this testimony is wholly uncontroverted by direct evidence, it does not foreclose a jury determination as to its credibility. No one else was available to testify to the contrary. No one else could see inside his mind, either at the time of trial or as it had been years earlier.

Where "from no reasonable point of view is (testimony on a particular fact) open to doubt," Chesapeake & Ohio Ry. Co. v. Martin, 1931, 283 U.S. 209, 216, 51 S.Ct. 453, 456, 75 L.E. 983, a jury is not permitted to disbelieve it. However, if the testimony in question relates to the witnesses own prior state of mind, an issue on which no other direct proof is possible, the court should disallow jury consideration only

in rare instances. In the typical case in which the court has restricted the jury to believing uncontroverted testimony, the issue on which, if there was other evidence contrary to the testimony -- in the form of direct proof or contrary expert opinion -- it should have been produced.2/ Chesapeake & Ohio Ry. Co. v. Martin, supra, involved the question whether twenty days was an unreasonably long period for the delivery of particular goods from Michigan to Virginia. See also Brown v. Ford Motor Co., 5 Cir. 1973, 479 F.2d 521, in which the relevant question was whether a particular part could have been installed in an automobile by a particular manufacturer, which contended that it did not use such parts at the time at issue. In such cases, the absence of directly conflicting proof

may support a court's conclusion that no genuine issue of credibility exists.

No such certainty is possible here. No direct interest or bias need be shown on the part of a witness to justify submitting to the jury the determination of that witness' credibility. Cf., Chesapeake & Ohio Ry. Co. v. Martin, supra, 283 U.S. at 216-217, 51 S.Ct. at 456; Brown v. Ford Motor Co., supra, 479 F.2d at 523.

Nor is Dr. tabb's testimony conclusive if considered as expert testimony on the adequacy of Upjohn's warning. Dr. Tabb was duly qualified as an eminent physician, whose background and experience are impressive. Although, in some slight degree, he did qualify his testimony on cross examination, his opinion as to the adequacy of Upjohn's warning was not

substantially self-impeached. There was, however, other testimony from which the jury might have believed that the warning given to physicians prescribing Cleocin was inadequate.

As juries are frequently instructed, expert opinions may be disregarded if outweighed by other evidence. 3 Devitt and Blackmar, Fed. Jury Prac. and Instructions Sec. 15.22 (3d ed. 1977). The jury could properly have accepted Dr. Tabb's testimony; it is no ground for a new trial that the jurors chose to reject it.

II. The Jury Charge

In its latest brief, the defendant's sole objection to the court's jury charge is the court's asserted failure to discuss in full one of the defendant's contentions. In setting forth the the parties positions,

the court's duty is to articulate the issues clearly, fairly, and without bias to either side. The trial court, however, is:

> ...not required to give every charge requested or to instruct the jury in the particular manner or form requested by the parties, even though such instructions state correct principles of law, if the subject matter of such requested special instructions was sufficiently covered by other instructions from the court. Messer v. L. B. Foster Company (5 Cir. 1958) 254 F.2d 412; Gerhart v. Henry Disston & Sons, Inc. (3 Cir. 1961) 290 F.2d 778; Southern R. Co. v. Haynes (5 Cir. 1961) 293 F.2d 291; Wiper v. Erie Sand S.S. Co. (2 Cir. 1961) 293 F.2d 491; Byrne v. Shell Oil Co. (7 Cir. 1961) 295 F.2d 797; Miller v. Brazel (10 Cir. 1962) 300 F.2d 283; Mathes & Devitt, Federal Jury Practice and Instructions, (West, 1965) sec. 5.01, et seq., p. 50.

Fleming v. Michigan Mutual Liability Company, 5 Cir. 1966, 363 F.2d 186, 189. The portion of the charge actually given appears to set forth the parties'

positions accurately and fairly; to the extent that this portion, out of context, falls short, the charge as a whole meets the test. Neither party, desiring a favorable wording, is entitled to be ventriloquist to a wooden judge. The charge was impartial and accurate. No new trial would be justified on this ground.

III. Dr. Morson's Letter

Upjohn finally alleges that the court erred in excluding from evidence a report by Dr. Basil C. Morson, an eminent British pathologist, concerning a histological study of a portion of Deborah Timm's colon. It argues essentially that the report was admissable because it was "trustworthy" and because the testimony of Dr. Morson, at trial or by deposition, could not have been compelled. The argument must

fail.

The report offered by Upjohn was hearsay, F.R. Evid., Rule 801 (c), and as such, was inadmissable unless covered by an exception to the general rule of inadmissibility, F. R. Evid. Rule 802.

Upjohn originally tried to introduce Dr. Morson's letter through the plaintiff's witness, Dr. Richard E. Leach, to whom the letter was addressed, on the ground that Dr. Leach solicited Dr. Morson's opinion in connection with his treatment of Deborah Timm. Dr. Leach emphatically denied on cross-examination however, that he in any way relied on statements made in Dr. Morson's letter in diagnosing or treating the plaintiff, Tr., Vol. IV, 135-171. Thus, the letter is not admissible under F. R. Evid., Rule 705, for the simple reason that the report

does not constitute facts or data underlying any of the testifying expert's opinions or inferences relevant to this case. The court's discussion of necessity and trustworthiness in Bryan v. John Bear Div. of FMC Corp., 5 Cir. 1978, 566 F.2d 541, in which the testifying expert did rely on the proffered hearsay, is thus inapposite.

Nor is the letter admissible, as Upjohn urged at trial, as a business record under F. R. Evid., Rule 803(6). Though it might be a report made and kept in the course of Dr. Morson's activities, no "custodian or other qualified witness" testified as to Dr. Morson's regular practice either in making or in keeping such records. It was not a business record as to the testifying witness, Dr. Leach, because it was surely not within the regular

practice of his business activity to make other physicians' diagnostic statements.

Finally, the letter was properly excluded under the portmanteau exception, F. R. Evid, Rule 803(24), permitting the admission of other hearsay when trustworthy. The court, in admitting evidence under Rule 803(24), is required to determine that the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts...." Notwithstanding Upjohn's belated argument that Dr. Morson's deposition or trial appearance could not be compelled, no showing at all appears that any effort was made to secure his voluntary testimony.

The suit was filed on July 10,

1975. The trial was set and postponed several times because of delays in completing discovery. The trial was actually held on September 6 through September 10, 1977. There was ample time in the interim to obtain Dr. Morson's deposition.

The defendant's motion for judgment notwithstanding the verdict, or for a new trial, is DENIED.

s/ Alvin B. Rubin

UNITED STATES DISTRICT JUDGE*

New Orleans, Louisiana,
June 17, 1978

*Sitting as District Judge by Designation of Chief Judge John R. Brown

1/ "On motions for directed verdict and for judgment notwith standing the verdict the Court should consider all of the evidence -- not

just that evidence which supports the non-mover's case -- but in the light and with all reasonable inferences most favorable to the party opposed to the motion." Boeing Co. v. Shipman, 5 Cir. 1969, 411 F.2d 365, 374 (en banc).

2/ However, a jury is not compelled in all cases to accept expert testimony, even if uncontradicted. Jenkins v. General Motors Corp., 5 Cir. 1971, 446 F.2d 377; Campbell v. TVA, 5 Cir. 1969, 421 F.2d 293; Griffin v. Missouri Pac. R. Co., 5 Cir. 1969, 413 F.2d 9; County Asphalt, Inc. v. Lewis Welding and Engineering Corp., 2 Cir. 1971, 444 F.2d 372; U.S. Steel Corp. v. Occupational Safety and Health Review Comm., 3 Cir. 1976, 537 F.2d 780; Hassan v. Stafford, 3

Cir. 1973, 472 F.2d 88; cf., Eason v. Weaver, 5 Cir. 1973, 484 F.2d 459; Mound Co. v. Texas Co., 5 Cir. 1962, 298 F.2d 905, cert. denied, 371 U.S. 817, 83 S. Ct. 29, 9 L.Ed. 2d 57.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 78-2476

DEBORAH D. TIMM and ROBERT H. TIMM, JR., husband and wife,

Plaintiffs-Appellees

versus

THE UPJOHN COMPANY

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Louisiana

August 18, 1980

Before BROWN, AINSWORTH and FRANK M. JOHNSON, Jr., Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

The plaintiffs, Deborah and Robert Timm, filed this diversity action in the district court for personal injuries to Deborah Timm, and consequential damages from those injuries, allegedly caused by her use of defendant The Upjohn Company's drug Cleocin.[1] A jury in the United States District Court for the Eastern District of Louisiana found Upjohn negligent in its marketing of Cleocin; it further found that the negligence was a proximate cause of Deborah Timm's injuries. Deborah Timm's damages were set at $195,000 and her husband Robert's damages were set at $115,000. At the close of plaintiffs' case and at the close of all the evidence, Upjohn moved for a directed verdict. Those motions were denied. Judgment was entered on the verdict. Upjohn timely moved for judgment

notwithstanding the verdict or alternatively for a new trial. These motions were denied.

On appeal, Upjohn raises several objections to the proceedings below: (1) that the district court should have granted its motions since all the evidence was to the effect that the Upjohn Company's warnings contained in the package insert and published in the Physician's Desk Reference (PDR) adequately warned the medical profession about the possibility of acute colitis[2/] occurring in association with Cleocin therapy, and no evidence to the contrary was presented; (2) that its motions were proper since all the testimony was to the effect that prior to prescribing Cleocin for Mrs. Timm, Dr. Harold Tabb, the prescribing physician, was aware that colitis and even colectomy could

result from Cleocin therapy, especially since Dr. Tabb's credibility was never put at issue; (3) that the district court committed reversible error when it failed to allow into evidence, as an exception to the Hearsay Rule, the medical report and opinion made by Dr. Basil C. Morson, an expert in colon pathology, and when it allowed into evidence documents pertaining to the drug Lincocin[3]/; and (4) that the jury charge given by the district judge was misleading. We have considered all of the points raised by Upjohn and find no reversible error. Accordingly, we affirm.

In March 1974, Deborah Timm sought relief from a condition called sinusitis[4]/ for which Dr. Harold Tabb prescribed the antibiotic Cleocin. Mrs. Timm used the drug as directed and

shortly after discontinuing its use, she developed severe pseudomenbranous colitis[5]/ that worsened to toxic megacolon. Eventually her colon had to be surgically removed and she required two further operations as a result of the original surgery. Causation is not at issue in this appeal and it is clear from the record that Mrs. Timm did not have colitis prior to her use of Cleocin.

(1) It has been established that, in the case of prescription drugs such as Cleocin, the manufacturer has no obligation to warn a consumer of that drug so long as the prescribing physician has been adequately warned of any potentially adverse side effects. Givens v. Lederle, 556 F.2d 1341, 1345 (5th Cir. 1977); Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th

Cir. 1974); Davis v. Wyeth Laboratories, 399 F.2d 121, 130 (9th Cir. 1968); cf. Heirs of Fruge v. Blood Services, 365 F.Supp. 1344, 1350 (W.D.La.1973), modified on other grounds, 506 F.2d 841 (5th Cir. 1975). The prescribing physician acts as a "learned intermediary" between the manufacturer and the consumer, since he is in the best position to weigh the benefits against the risks of a particular drug therapy. Reyes v. Wyeth Laboratories, supra, 498 F.2d at 1276; see Merrill, Compensating for Prescription Drug Injuries, 59 Va.L.R. 1, 91 (1973). Upjohn asserts that its warning[6]/ of "acute colitis" was adequate to notify Dr. Tabb of the potentially dangerous side effects of Cleocin; similarly, plaintiffs conceded in oral argument that, if the warning was adequate, the

action would more properly lie against the prescribing physician.[7]/

(2) Upjohn's major claim on appeal is that the evidence concerning Dr. Tabb's awareness of the hazards of Cleocin was uncontroverted and thus the evidence as to Upjohn's liability was insufficient as a matter of law to generate a question for the jury. Defendant argues that Dr. Tabb unequivocally stated in his testimony that he knew that a colectomy and the more severe forms of colitis could result from the use of Cleocin. We disagree.[8]/

The standard of review for questions concerning sufficiency of the evidence is well settled in this Circuit. Givens v. Lederle, supra, 556 F.2d at 1345; Reyes v. Wyeth Laboratories, supra, 498 F.2d at 1288;

Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969).

In light of the Boeing standard, we hold that a rational basis for the jury's verdict exists since the evidence regarding the adequacy of Upjohn's warning to Dr. Tabb was sufficient to create a question for the jury. The jury was entitled to weigh the conflicting statements made by Dr. Tabb and the other physicians along with all the other evidence presented in the case. Bauman v. Centex Corp., 611 F.2d 1115, 1117 (5th Cir. 1980); Accord: Ezagui v. Dow Chemical Corp., 598 F2d 727 (2d Cir. 1979).

(3,4) Upjohn's contentions that the trial court made certain erroneous evidentiary rulings and that the trial judge's charge to the jury was misleading are without merit. In the

evidentiary rulings complained of, the lower court acted well within its discretion. See Givens v. Lederle, supra, 556 F.2d at 1346; Kershaw v. Sterling Drug, Inc., 415 F.2d 1009, 1011 (5th Cir. 1969); cf. Bryan v. John Bean Division of FMC Corp., 566 F.2d 541, 545 (5th Cir. 1978). In reviewing the trial judge's instructions to the jury, we consider the charge as a whole to determine whether the jury was misled and whether it understood the issues presented. Couglin v. Capitol Cement Co., 571 F.2d 290, 300 (5th Cir. 1978); Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1100 (5th Cir. 1973). Under this standard we find no error. Reyes v. Wyeth Laboratories, supra, 498 F.2d at 1292.

AFFIRMED.

1/ Cleocin is the trade name for the

antibiotic drug clindamycin.

2/ Colitis, which is sometimes called colonitis, is an inflammation of the mucous membrane of the colon.

3/ Lincocin is the trade name for the drug lincomycin, a chemical analog to clindamycin.

4/ Sinusitis is an inflammation of the sinus membrane and can cause hoarseness and a sore throat.

5/ Chronic ulceration in the colon.

6/ The warning in the PDR stated:

"WARNINGS

The following reactions have been reported with the use of clindamycin.

CASES OF SEVERE AND PERSISTENT DIARRHEA HAVE BEEN REPORTED AND HAVE AT TIMES NECESSITATED

DISCONTINUANCE OF THE DRUG. THIS DIARRHEA HAS BEEN OCCASIONALLY ASSOCIATED WITH BLOOD AND MUCUS IN THE STOOLS AND HAS AT TIMES RESULTED IN ACUTE COLITIS."

7/ Dr. Tabb is not a party to this suit.

8/ From any view, Dr. Tabb's testimony regarding his awareness of the potentially dangerous side effects is certainly not unequivocal; at best it is confused. For example, on direct examination (and in his deposition) Dr. Tabb stated that he relied on the package insert and the warning in the PDR to give him full and complete information as to the side effects of Cleocin. Trial Transcript, Vol. X at 195; Record, Vol. I at 241, 244. Further, he

testified in response to a hypothetical that had he known of the types of adverse reactions (ulcerative colitis, toxic megacolon, fatalities and 10% incidence of pseudomembranous colitis) he probably would not have prescribed Cleocin for plaintiff. Trial Transcript, Vol. X at 200. On cross-examination he testified that at the time he prescribed Cleocin he was aware that a colectomy could result from using it. Trial Transcript, Vol. X at 205. But on re-direct Dr. Tabb stated that he first became aware that a colectomy could result from using Cleocin when plaintiff's lawyer informed him of her condition. Trial Transcript, Vol. X at 214.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-2476

DEBORAH D. TIMM and ROBERT H. TIMM, JR., husband and wife,
Plaintiffs-Appellees

versus

THE UPJOHN COMPANY
Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING
(October 6, 1980)

Before BROWN, AINSWORTH and FRANK M. JOHNSON, JR., Circuit Judges

PER CURIUM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause is hereby denied.

ENTERED FOR THE COURT:

s/ Frank M. Johnson, Jr.
United States Circuit Judge

APPENDIX D

THE PATHOLOGY DEPARTMENT OF

ST. MARK'S HOSPITAL

01-253 8821 City Road,

Dr. Basil Morson London, EC1V 2PS

BCM/dh/41501 September 26, 1974

Dear Dr. Leach,

Re:- Mrs. Deborah D. TIMM, aged 23

Your Ref:- 1083065

Sections: 5682/74 & blocks

I am sorry there seems to have been some considerable delay in replying to your leter of the 8th August 1974. In fact, your letter did not arrive until quite recently.

In my opinion, your histological sections show the appearances of very active and very severe ulcerative colitis. There is very extensive, full-thickness mucosal ulceration with surviving tags of mucosa. In one piece of tissue, where the mucous membrane is largely intact; the histology is typical of ulcerative colitis in a very active phase with much vascular congestion, intramucosal haemorrhages, crypt abscesses and goblet cell depletion of surviving epithelium. Where the submucosa remains it is oedematous and very vascular. The muscle layers are thin and oedematous and in places they are being broken up by a very vascular and inflammatory infiltrate. All the tissues of the bowel wall show intense vascular congestion. These are the appearances I associate with very

active, very severe ulcerative colitis, probably associatd with toxic megacolon. It looks to me, at least, as if there was incipient perforation and this is confirmed by the appearance of the bowel at surgery.

The macroscopic and microscopic features of "anti-biotic bowel" or what I prefer to call, membranous or pseudo-membranous colitis are quite different. The pathogenesis of this lesion is obscure but it does seem to be associated with clindamycin therapy. However, many of the patients having such anti-biotic treatment are also exposed to shock or other causes for splanchnic hypotension and this explains why many of the histological features of membranous colitis have a close resemblance to those conditios in the gut which are definitely the result of acute ischaemia of the non-

obstructive type. It is difficult to give all the details in a letter but the macroscopic appearances of membranous colitis usually take the form of isolated plaques of yellowish exudate or more diffuse membrane formation which readily becomes detached from the surface of the bowel during fixation. There are rather distinctive histological appearances. The crypts become dilated, the lining epithelium is necrotic and the whole appearance appears as if the crypts were blowing up and exploding, releasing a membrane on the surface of the gut composed of mucus, fibrin and inflammatory cells.

I would be extremely interested to see the histology of the other three patients who had treatment with cleocin. The diagnosis of membranous colitis can be readily recognised by rectal biopsy

(and indeed by sigmoidoscopy) and are quite different from ulcerative colitis or Crohn's disease. Quite why the particular patient we are concerned with in this letter had symptoms which followed so soon after the administration of clindamycin could be no more than an association of circumstances. On the other hand, there is plenty of evidence that anti-biotic and chemotherapy, as well as the administration of enemas, may influence and indeed exacerbate the clinical course of ulcerative colitis.

The whole subject of membranous or so-called antibiotic colitis is a very difficult one and I could not possibly give you more information in a letter. However, I think you will find very good descriptions of the pathology of antibiotic colitis in the literature, partic-

ularly when the title of the paper is about membranous or pseudomembranous colitis.

I look forward to having further communication with you on this topic.

Yours sincerely,

B. C. Morson

Dr. Richard E. Leach,
Gastroenterology Department
Sellera and Sanders Clinic,
4427 South Robertson Street,
New Orleans, LA. 70115,
U.S.A.